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**UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

**COTTONWOOD CHRISTIAN CENTER,** )  
 )  
 ) **Plaintiff,** )  
 ) **v.** )  
 ) **CYPRESS REDEVELOPMENT AGENCY; CITY OF CYPRESS; DOES 1-10.,** )  
 ) **Defendants.** )  
\_\_\_\_\_ )

**CASE NO. SA CV 02-60 DOC (ANx)**

**ORDER DENYING  
DEFENDANTS' MOTION TO  
DISMISS AND GRANTING  
PLAINTIFF'S MOTION FOR A  
PRELIMINARY INJUNCTION**

Before the Court are Defendants City of Cypress and Cypress Redevelopment Agency's motion to dismiss and Plaintiff Cottonwood Christian Center's motion for a preliminary injunction. After reviewing the moving, opposing, and replying papers, and for the reasons set forth below, the Court DENIES Cypress's motion to dismiss and GRANTS Cottonwood's motion for a preliminary injunction.

**I.  
BACKGROUND**

This case is a dispute between the City of Cypress (Cypress or City) and the Cottonwood Christian Center (Cottonwood) over an 18 acre parcel of property located at the corner of Katella Avenue and Walker Avenue in Cypress, California (the Cottonwood Property). In sum,

1 Cottonwood, the owner of the Cottonwood Property, seeks to build a church facility which  
2 would include a 4,700 seat auditorium and surrounding buildings for use in its ministries. After  
3 failing to get the appropriate land use permits from the City, Cottonwood brought this action.  
4 Cypress, on the other hand, wants the Cottonwood Property to be used as commercial retail  
5 space, with the plan to place a major discount retailer such as Costco on the Cottonwood  
6 Property. To this end, the City has begun eminent domain proceedings on the Cottonwood  
7 Property. Cottonwood seeks to preliminarily enjoin those proceedings.

8 **A. City of Cypress**

9 Cypress is a charter city located in Northwestern Orange County, California. Cypress was  
10 incorporated in 1956 and was originally named Dairy City. At the time of its incorporation,  
11 Cypress consisted of mostly ranch houses and dairy farms. In the half-century since its  
12 founding, Cypress has grown from a population of less than 1,000 people to a population of  
13 approximately 48,000. Cypress covers 4,257 acres and includes approximately 16,125  
14 residences, 1,200 commercial businesses, a community college, and an assortment of parks,  
15 schools, service organizations, and churches. Although the dairy farms have largely faded away,  
16 Cypress remains predominately a bedroom community.

17 Cypress is governed by a five-member City Council in a “council-manager” form of  
18 government. In April 1979, the Cypress City Council adopted Ordinance No. 639 which created  
19 the Cypress Redevelopment Agency (Redevelopment Agency) pursuant to Cal. Health & Safety  
20 Code § 33101. The Redevelopment Agency was created in order to redevelop various blighted  
21 areas within Cypress. The Redevelopment Agency is governed by a five-member Board of  
22 Directors. Pursuant to statute, the Board of Directors of the Redevelopment Agency consists of  
23 the members of the Cypress City Council.

24 **B. Los Alamitos Race Track Redevelopment Project**

25 Near the center of the City are two of Cypress’s major businesses—the Los Alamitos Race  
26 Track and the Cypress Golf Club. Those properties are within what is now the Los Alamitos  
27 Race Track and Golf Course Redevelopment Project (LART Plan) Area. The LART Plan Area  
28 consists of nearly 300 acres bounded by Katella Avenue on the South, Walker Street on the East,

1 Cerritos Avenue on the North and Lexington Drive on the West. The Cottonwood Property is  
2 located in this area, along the corner of Katella Avenue and Walker Avenue. By 1987, this  
3 entire property was zoned PS (Public/Semi-Public). Among other uses, churches are permitted  
4 provided they receive a Conditional Use Permit (CUP).

5 In 1984, Hollywood Park Realty Enterprises, Inc. (Hollywood Park) purchased the LART  
6 Plan Area property, including the race track and the golf course. In 1987, it began formulating  
7 proposals to redevelop the land into a business park. In response to proposals to close the golf  
8 course and turn 224 acres of this land into commercial or industrial uses, voters in Cypress  
9 adopted "Measure D" at a special election in November 1987. Measure D was an initiative  
10 which prohibited the City Council from changing the designation of any land zoned PS or  
11 allowing any land use not then permitted under the PS zoning. Thus, the City Council could not  
12 change the land uses in the LART Plan Area without approval of the voters.

13 In 1988, a new project called Cypress Downs was proposed for the area. Although it  
14 included less commercial space than the 1987 proposals, it left only 30 of the 300 acres zoned  
15 PS. Pursuant to Measure D, the plan was put before the voters, who rejected it.

16 Sometime prior to 1990, the entire LART Plan Area, including the golf course and the  
17 race track, were sold to Cypress Development Partnership (CDP). In 1990, CDP sought to have  
18 75 acres of its property, including the current Cottonwood Property, re-designated as PB25A  
19 (Planned Business Park of 25 acres or more). This re-designation would allow additional land  
20 uses beyond those allowed in a PS zone, but would still allow churches with a CUP. Consistent  
21 with the provisions of Measure D, the proposal was submitted to the voters as the Cypress  
22 Business and Professional Center Initiative (CBPCI) at a special election on April 24, 1990. The  
23 voters approved CBPCI and the property was rezoned. Sometime thereafter, the ownership of  
24 the land was broken up, and individual entities came into ownership of various parcels of the  
25 property.

26 Also in April 1990, the Cypress City Council adopted the Cypress Business and  
27  
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1 Professional Center Specific Plan (Specific Plan).<sup>1</sup> The Specific Plan is a “a planning tool that  
2 implements the physical and economic development of the project area.” (Belmer Decl. Ex. G at  
3 180, Specific Plan at III-1.) The Specific Plan’s goals are “[t]o achieve the best possible land  
4 use for the Specific Plan area with emphasis on employment generation, economic growth, and  
5 generation of revenue, while retaining the golf course and race track uses on site.” (Id. at III-2).  
6 Under the Specific Plan, the types of uses allowed are “a wide range of uses in the development  
7 area that achieve compatibility, reflect the needs of the community and are marketable.” (Id.)  
8 The Specific Plan designated the area of the Cottonwood Property as “Professional Office,”  
9 which includes churches as permitted with a CUP.

10         Shortly after the passage of CBPCI, the City Council adopted Ordinance No. 851 on June  
11 18, 1990, which created the Los Alamitos Race Track and Golf Course Redevelopment Project  
12 (LART Plan). Adoption of the LART Plan put the land under the jurisdiction of the  
13 Redevelopment Agency. As a necessary condition for adopting the LART Plan Area, the City  
14 determined that the LART Plan Area was blighted.

15         In addition to placing the area under the jurisdiction of the Redevelopment Agency, the  
16 City adopted the LART Plan which set forth seven general goals including elimination of  
17 environmental deficiencies, comprehensive planning, stimulating growth and development.  
18 Additionally, the LART Plan includes 17 specific proposed plans for action including exercise of  
19 eminent domain, redevelopment, provision of open space, encouraging public and private  
20 improvements, providing replacement housing, open spaces, installation of streets and sidewalks  
21 and addressing financial burdens.

22         Despite having approved a re-zoning, the Specific Plan, and a redevelopment plan, the  
23 LART Plan Area remains largely underdeveloped. After ten years of being within a  
24 redevelopment zone, less than 10 percent of the land set aside for a business park in the Specific  
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26         <sup>1</sup> The Specific Plan was adopted one week before the voters approved CBPCI.  
27 Presumably, the Specific Plan was contingent upon adoption of the CBPCI, as it includes  
28 the land re-zoned under the CBPCI. Essentially, the two measures were companion  
planning pieces.

1 Plan has been developed. It is one of the largest areas of underdeveloped real property in  
2 Orange County. Most of the LART Plan remains zoned PS for public and semi-public uses. The  
3 75 acres zoned PB25A are located primarily along Katella Avenue on the Eastern side of the  
4 LART Plan Area along Walker Street. Katella Avenue is a major arterial street and is  
5 designated by the Orange County Transportation Authority as a “smart street.” Walker Avenue  
6 is a major “collector street.” Accordingly, Cypress describes the Cottonwood Property as a  
7 “gateway property.” According to the City, the way that the Cottonwood Property is developed  
8 will determine how the rest of the undeveloped property in the LART Plan Area is developed.  
9 The Cottonwood Property, however, has remained essentially vacant for the last 12 years.

10 **C. Cottonwood Christian Center**

11 Cottonwood is a non-denominational Christian church with its current worship facilities  
12 located in Los Alamitos, California, adjacent to Cypress. Cottonwood has grown remarkably  
13 over the last twenty years, from approximately 50 adult members when it was founded in 1983 to  
14 its current membership of over 4,000 adults and 1,200 children and youth. Cottonwood’s  
15 popularity is not limited to the immediate vicinity. Cottonwood conducts a television ministry  
16 where its services are broadcast on television. Additionally, Cottonwood hosts numerous  
17 national conferences each year, drawing visitors from among the several states.

18 As a result of its fantastic expansion, Cottonwood has outgrown its Los Alamitos site  
19 which can only accommodate 700 attendees at one time. In order to deal with its growing  
20 membership, Cottonwood holds six worship services each weekend, four on Sunday and two on  
21 Saturday. Because of insufficient parking on site, Cottonwood has instituted a “shuttle  
22 ministry,” whereby it transports attendees from off-site parking lots to its church facility. Even  
23 with the Shuttle Ministry and multiple weekend services, Cottonwood is unable to accommodate  
24 all the people that want to attend its services and it is unable to conduct outreach to potential new  
25 members. The physical constraints of its current facility also limit Cottonwood’s ability to  
26 conduct many of its different programs from youth conferences, women’s ministries, daycare  
27 facilities, English language classes for native Spanish speakers, and missionary training.

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1           **1.     Cottonwood’s Religious Beliefs**

2           Cottonwood is guided by its vision of “bringing a living Jesus to a dying world.”  
3           According to Cottonwood’s Senior Pastor, Bayless Conley, Cottonwood believes that  
4                     the teachings of Jesus require [Cottonwood members] to make a  
5                     lasting impact in the Orange and Los Angeles County communities  
6                     [it] serve[s] (as well as throughout Southern California and the  
7                     world) by ministering to the spiritual and physical needs of the  
8                     members of these communities. [Cottonwood members] are  
9                     therefore compelled to continually seek growth in the size of [their]  
10                    congregation and [their] ministries.

11           Cottonwood’s present facility severely restricts Cottonwood’s ability to fulfill its  
12           missions. Additionally, the multiple services require Cottonwood’s ministers to cut short their  
13           sermons because of the need to accommodate multiple weekend services. The shortcomings of  
14           its current facilities also conflict with one of the church’s philosophies as to the nature of  
15           worship. As Pastor Conley explains, Cottonwood members

16                    believe that the Bible teaches all individual Christians to join a  
17                    church. Cottonwood is a collection of individual Christian believers  
18                    who together form one body—the church—that is the bride of Christ.  
19                    Because the church is one body, it is essential to our faith that the  
20                    whole church body regularly assemble together as a body to worship  
21                    God, to carry out God’s divine ordinances, such as communion and  
22                    baptism, and to fellowship with one another so that one part of the  
23                    body can serve the needs of another part of the body.

24           **2.     New Facility for Cottonwood**

25           Because of its growing membership and religious needs, Cottonwood began searching for  
26           a new facility in 1994. Cottonwood determined that it needed a facility large enough for its  
27           present and future ministries. It sought a location in the northwestern part of Orange County  
28           because a large number of its members are in Cypress and Los Alamitos. In 1998, Cottonwood

1 targeted six individual parcels of land in the LART Plan Area. These six parcels were owned by  
2 four different entities. Cottonwood spent a year acquiring the different parcels until it had  
3 assembled the current 18 acre Cottonwood Property site. Cottonwood’s efforts culminated with  
4 two different land-sale contracts that closed escrow in September 1999.

5 Cottonwood developed detailed plans to use its newly acquired property. Its proposed  
6 church center would contain a 300,000 square foot worship center with more than 4,700 fixed  
7 seats, multiple classrooms and a multi-purpose room for youth and other ministries. The  
8 proposed center would also have a youth activity center, gymnasium, and study rooms for after  
9 school youth programs. The facility would also include a 200 child daycare facility for church  
10 members and the surrounding community and a religious bookstore. The proposed center would  
11 have sufficient space for all of Cottonwood’s current ministries, community service programs,  
12 and worship services.

13 **D. Church’s Efforts to Obtain Zoning Approval**

14 During the year that Cottonwood was assembling and planning its development of the  
15 Cottonwood Property, Cottonwood contacted Cypress officials about the proposed Cottonwood  
16 development. On June 2, 1999, Cottonwood representatives met with City planning officials to  
17 discuss the proposed plan. According to a June 4, 1999 follow-up letter sent by Alice Angus,  
18 then Cypress Community Development Director, churches were indeed permitted uses on the  
19 Cottonwood Property. Staff, however, took the position that it was “unlikely that a church  
20 would be found consistent with the goals and objectives of the Redevelopment Plan and/or  
21 Specific Plan.”<sup>2</sup>

22 Cottonwood completed assembly and purchase of the Cottonwood Property in September  
23 1999. After making numerous studies and plans, Cottonwood submitted a CUP application to  
24 the City on October 6, 2000. On October 26, 2000, the City Planning Manager informed  
25 Cottonwood that the CUP application was incomplete because it did not contain design review

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26  
27 <sup>2</sup> There is no indication why the City staff believed that a church would be  
28 incompatible with the LART Plans and Specific Plan goals of “achiev[ing] the best  
possible land use for the Specific Plan area” and “eliminating blight.”

1 studies that the City staff desired.

2         The administrative rejection of the CUP application was significant because while  
3 Cottonwood was making plans and seeking approvals to build a church on its property, the City  
4 had other designs for the land. In August 2000, City staff proposed a new usage of much of the  
5 LART Plan Area property on Katella and Walker Avenues. Apparently having determined that  
6 the Business Park plan was not working out, staff created a plan for a “Town Center” on  
7 approximately 35 to 45 acres of the LART Plan Area, including the Cottonwood Property. The  
8 Town Center would have two or three major retail anchor stores and include a mix of  
9 restaurants, smaller retail stores, and movie theaters, to create a center similar to the Irvine  
10 Spectrum or The Block in Orange. In order to allow the staff to explore this development plan,  
11 the City Council adopted a moratorium on discretionary land use permits on October 30, 2000.  
12 The moratorium prevented the granting of any discretionary land use permits, including CUPs,  
13 that were not complete prior to October 30, 2000. The original moratorium was for a 45 day  
14 period but was extended for ten months and 15 days and again for an additional 12 months to  
15 October 30, 2002.

16         Because the City Planning Manager had determined that Cottonwood’s application was  
17 incomplete, its application for a CUP could not even be considered by the City. Cottonwood  
18 was therefore effectively prevented from obtaining a CUP. Accordingly, it appealed the City  
19 Planning Manager’s decision to the City Council.

20         While Cottonwood’s appeal was pending, City staff explored the Town Center Plan and  
21 solicited from property-owners whether they were interested in participating in the Town Center  
22 plan. City staff sent a letter to Cottonwood to determine its interest in participating in the  
23 project.

24         Apparently, the Town Center Project did not turn out to be feasible. In late 2001, City  
25 staff determined to develop a scaled down project with one or two major retail anchors and a  
26 small number of retail shops or restaurants (not dissimilar from a strip mall). This project was  
27 labeled the “Walker/Katella Retail Project. Instead of the 35 to 45 acres of the Town Center  
28 Project, the City’s Walker/Katella Retail Project planned to use only 18 acres. The only land

1 included in the Walker/Katella Retail Project is the Cottonwood Property.

2 The most notable proposal for the Walker/Katella Retail Project is from Costco, a major  
3 warehouse style discount retail outlet. Costco has proposed building a 150,000 square foot  
4 Costco store on the land, complete with a tire service center and food service component. The  
5 development would also include two 7,000 square-foot free-standing restaurants.

6 Again, the City sent Cottonwood a letter seeking a statement of whether Cottonwood was  
7 interested in participating in the new Walker/Katella Retail Project. Cottonwood responded by  
8 indicating that it was interested in developing the land, as a church.

9 Finally, on February 11, 2002, the City Council considered Cottonwood's appeal. The  
10 City Council recognized that the City Planning Manager's decision had been in error and that, in  
11 fact, design review studies were not required before a CUP was granted. The City Council  
12 deemed the CUP application complete and directed City staff to undertake its review. In turn,  
13 City staff has since requested that Cottonwood make a \$10,000 deposit for City staff to pay for  
14 environmental experts to undertake an environmental review.

#### 15 **E. Cypress's Exercise of Eminent Domain**

16 On February 28, 2002, the Redevelopment Agency made an offer to purchase the  
17 Cottonwood Property for \$14,583,500. Cottonwood refused.

18 On April 8, 2002, the Redevelopment Agency determined that Cottonwood's statement of  
19 interest in participation was non-responsive. It further determined that, even if it were  
20 responsive, a third-party statement of interest from Costco was more consistent with the City's  
21 plans.<sup>3</sup> The Redevelopment Agency then determined to take steps to acquire the land.

22 On May 28, 2002, the City Council adopted a Resolution of Conformity, declaring that  
23 the proposed Walker/Katella Retail Project conformed to the City's General Plan and the  
24 Specific Plan. That same day, the Redevelopment Agency adopted a Resolution of Necessity,  
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26 <sup>3</sup> This is self-evident, given that the plan for the Walker/Katella Retail Project was  
27 to place a Costco on the site. Needless to say, the Walker/Katella Retail Project is far  
28 different from the Business Park plan that the City had devised when it adopted the  
LART Plan and the Specific Plan in 1990.

1 determining that it was necessary for the Redevelopment Agency to acquire the land and  
2 directing counsel to file an eminent domain action. The City filed an action in state court to  
3 condemn the land on May 29, 2002.

4 **F. Current Lawsuit**

5 Cottonwood had filed this action on January 15, 2002, challenging various land use  
6 decisions by the City and the Redevelopment Agency as violating the United States and  
7 California Constitutions and various state statutes. Cottonwood simultaneously filed an identical  
8 state court action, which the City removed to this Court and consolidated into this action. On  
9 June 28, 2002, Cottonwood filed an Amended Complaint and seeking to preliminarily enjoin the  
10 City's condemnation actions. The City filed a motion to dismiss certain claims based on  
11 improper service by publication.

12 **II.**

13 **MOTION TO DISMISS**

14 **A. Legal Standard**

15 Under Federal Rule of Civil Procedure 12(b)(6), a complaint can be dismissed when a  
16 plaintiff's allegations fail to state a claim upon which relief can be granted. The Court must  
17 construe the complaint liberally, and dismissal should not be granted unless "it appears beyond  
18 doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him  
19 to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02 (1957); *see Balistreri v.*  
20 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (stating that a complaint should be  
21 dismissed only when it lacks a "cognizable legal theory" or sufficient facts to support a  
22 cognizable legal theory). The Court must accept as true all factual allegations in the complaint  
23 and must draw all reasonable inferences from those allegations, construing the complaint in the  
24 light most favorable to the plaintiff. *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667,  
25 670 (9th Cir. 1993); *Balistreri*, 901 F.2d at 699; *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898  
26 (9th Cir. 1986). Dismissal without leave to amend is appropriate only when the Court is  
27 satisfied that the deficiencies of the complaint could not possibly be cured by amendment.

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1 *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996); *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th  
2 Cir. 1987).

3 **B. Discussion**

4 Defendants seek to dismiss Counts 16 through 21 of Cottonwood’s complaint, which seek  
5 review under writs of mandate for various zoning decisions,<sup>4</sup> due to technical violations of the  
6 Validation Statutes, Cal. Civ. Proc. Code § 863. Pursuant to the Validation Statutes under which  
7 Cottonwood seeks relief:

8 If the interested person [here Cottonwood] bringing such action fails  
9 to complete the publication and such other notice as may be  
10 prescribed by the court in accordance with Section 861 and to file  
11 proof thereof in the action within 60 days from the filing of his  
12 complaint, the action shall be forthwith dismissed on the motion of  
13 the public agency unless good cause for such failure is shown by the  
14 interested person.

15 Cal. Civ. Proc. Code § 863

16 Here, Cottonwood filed the case on January 15, 2002. Thus, Cottonwood was required to  
17 file the proof of publication under the Validation Statute by March 18, 2002. Cottonwood did  
18 not complete the filing of proof of service until April 16, 2002. Defendants make much of this  
19 29 day delay, but Cottonwood is excused for good cause shown.

20 “The concept of good cause should not be enshrined in legal formalism; it calls for a  
21 factual exposition of a reasonable ground for the sought order.” *Waters v. Superior Court*, 27  
22 Cal. Rptr. 153, 157 (Cal. 1962). “Good cause” must include reasonable diligence that does not  
23 cause “abuse of the inherent rights of the adversary.” *Id.* at 158 (quoting *Greyhound Corp. v.*  
24 *Superior Court*, 15 Cal. Rptr. 90 (Cal. 1961).

25 There is no argument by the City that the service was insufficient or that it did not allow  
26 sufficient time for members of the community to respond to it (although none have). Nor do

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27  
28 <sup>4</sup> These counts are essentially identical in the Amended Complaint.

1 Defendants contend that they have been prejudiced by not knowing whether the publication was  
2 complete. Cottonwood, on the other hand, shows good cause to be excused for the minor delay.

3 Cottonwood first sought an order for publication on February 19, 2002.<sup>5</sup> The Court did  
4 not grant that request for more than a week, as it researched the service by publication  
5 requirements, not generally used in federal court. Furthermore, service was delayed because  
6 Cottonwood, seeking to insure its rights, filed suit in both state and federal court. On February  
7 13, 2002, Defendants removed the state case to federal court. Cottonwood was therefore unsure  
8 of the proper notice to give, since sending notice that answers should be filed in state court  
9 would be moot if the case were transferred here. Certainly, the state legislature in writing the  
10 Validation Statute did not take into account those cases where a writ of mandate action is  
11 removed to federal court.

12 Cottonwood had the *Orange County Register*, an appropriate newspaper for service by  
13 publication, publish the notice on the earliest date following the Court's order. Unfortunately,  
14 the delay from the Court and the delay in lead time for the *Register* resulted in the service by  
15 publication being completed after the 60 day window. Cottonwood filed its proof of service as  
16 soon as it obtained the documentation from the *Register*.

17 In short, Cottonwood did nearly everything it could to comply with the very short  
18 deadline in the Validation Statutes, and the resulting delay of less than one month has worked no  
19 prejudice to any party. This is the essence of "good cause shown."

20 Accordingly, Defendants' motion to dismiss is DENIED.

### 21 III.

## 22 PRELIMINARY INJUNCTION

### 23 A. Legal Standard

24 Generally, courts grant equitable relief in the event of irreparable injury and the  
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26 <sup>5</sup> Defendants also make much of the fact that they were not notified of the ex parte  
27 application, although there is no evidence that they would have opposed it, or that it was  
28 an improper application, especially given the short time frame required under the  
Validation Statutes.

1 inadequacy of legal remedies. *See Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir.  
2 1994). Plaintiffs must satisfy additional requirements in order to be granted preliminary relief.  
3 The “traditional test” requires that the plaintiff demonstrate: (1) a strong likelihood of success on  
4 the merits; (2) the possibility of irreparable injury; (3) greater hardship to the plaintiff than to the  
5 defendant; and (4) that the public interest favors granting the injunction. *See Johnson v. Cal.*  
6 *State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995); *Atari Games Corp. v. Nintendo of*  
7 *Am., Inc.*, 897 F.2d 1572, 1575 (Fed. Cir. 1990) (discussing Ninth Circuit law); *State of Alaska*  
8 *v. Native Village of Venetie*, 856 F.2d 1384, 1388 (9th Cir. 1988); *Los Angeles Mem’l Coliseum*  
9 *Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). In some situations, an  
10 “alternative test” can be applied: “When the balance of hardships tips decidedly toward the  
11 plaintiff,” a preliminary injunction may be issued upon a less rigorous showing of likelihood of  
12 success on the merits so long as the plaintiff’s allegations raise “serious questions” as to the  
13 merits. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988); *Am.*  
14 *Motorcyclist Ass’n v. Watt*, 714 F.2d 962, 965 (9th Cir. 1983); *Stanley*, 13 F.3d at 1319.

15 These different formulations of the test represent different points on a continuum. *See*  
16 *Big Country Foods, Inc. v. Bd. of Educ.*, 868 F.2d 1085, 1088 (9th Cir. 1989); *Oakland Tribune,*  
17 *Inc. v. Chronicle Publ’g Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985); *Regents of Univ. of Cal. v.*  
18 *Am. Broad. Cos.*, 747 F.2d 511, 515 (9th Cir. 1984) (describing various formulations of the tests  
19 and stating, “Long or short, old or new, these tests are not separate tests but the outer reaches of  
20 a single continuum.”) (internal citations and quotation marks omitted). Under whichever test is  
21 applied, the plaintiff must “demonstrate that there exists a significant threat of irreparable  
22 injury.” *Oakland Tribune*, 762 F.2d at 1376. Furthermore, again under whichever test is  
23 applied, the plaintiff must show, “as an irreducible minimum[,] . . . a fair chance of success on  
24 the merits.” *Martin v. Int’l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984); *Cairns v.*  
25 *Franklin Mint Co.*, 24 F. Supp. 2d 1013, 1037 (C.D. Cal. 1998).

## 26 **B. The Anti-Injunction Act and the Abstention Doctrine**

27 As a threshold matter, Defendants argue that a preliminary injunction is barred by both  
28 the Anti-Injunction Act, 28 U.S.C. § 2283, and the Abstention Doctrine. The Court determines

1 that neither prevents the relief requested, and thus the merits of the case may be addressed.

2 **1. Anti-Injunction Act**

3 The Anti-Injunction Act, 28 U.S.C. § 2283, provides: “[a] court of the United States may  
4 not grant an injunction to stay proceedings in a State court except as expressly authorized by Act  
5 of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its  
6 judgments.” This case appears to fall under three exceptions to the act. First, the Anti-  
7 Injunction Act applies to state cases instituted before the initiation of the federal action. *Wulp v.*  
8 *Corcoran*, 454 F.2d 826, 831 n.5 (1st Cir. 1972). Here, Cottonwood commenced this case more  
9 than four months before the Defendants filed their state condemnation action. Second, an  
10 injunction is in aid of this Court’s jurisdiction, as the condemnation of the Cottonwood Property,  
11 and the transfer to a private retailer such as Costco, would make it impossible for the Court to  
12 order the eventual specific relief which Cottonwood may be entitled to in the nature of granting  
13 its application for a CUP. Third, an injunction appears to be authorized under the Religious  
14 Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-2, which  
15 allows any person suing under RLUIPA to obtain “appropriate relief.” Here, the alleged  
16 violation of RLUIPA is the refusal to grant a CUP and the institution of condemnation  
17 proceedings without a public use. The “appropriate relief” is therefore an injunction.

18 **2. Abstention Doctrine**

19 The Abstention Doctrine is premised on the same purpose as the Anti-Injunction Act. *See*  
20 *Younger v. Harris*, 401 U.S. 37, 53, 91 S. Ct. 746, 755 (1971). It is therefore also inapplicable to  
21 this case. *Younger* abstention applies only when “the state proceedings are (1) ongoing, (2)  
22 implicate important state interests, and (3) provide the plaintiff an adequate opportunity to  
23 litigate federal claims.” *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095,  
24 1103 (9th Cir. 1998). Furthermore, under the abstention doctrine, “unless ‘vital state interests’  
25 are at stake, federal district courts are not proscribed from interfering with ongoing state civil  
26 proceedings when necessary to vindicate federally protected civil rights.” *Miofsky v. Superior*  
27 *Court*, 703 F.2d 332, 338 (9th Cir. 1983).

28 Abstention is not proper under the first prong of the abstention test, because *Younger* does

1 not apply to state cases instituted after the federal action. *Village of Belle Terre v. Boraas*, 416  
2 U.S. 1, 2, 94 S. Ct. 1536, 1538 n.1 (1974). The state eminent domain proceedings were  
3 instituted four months after Cottonwood filed this case.<sup>6</sup> The third prong also does not apply  
4 because Cottonwood will have no opportunity to litigate its federal claims in state court. If the  
5 City successfully condemns the Cottonwood Property, then Cottonwood’s claims that the City’s  
6 refusal to grant its CUP application will be moot. Furthermore, an important aspect of the  
7 eminent domain proceedings is the question of just compensation. A property that has zoning  
8 entitlements is more valuable than one without. Finally, abstention is not proper because this  
9 case is necessary to vindicate Cottonwood’s First Amendment rights.

10 **C. Likelihood of Success on the Merits**

11 **1. Summary of Cottonwood Claims**

12 Cottonwood claims that the City’s refusal to grant its application for a CUP, its exercising  
13 eminent domain over the Cottonwood Property, and its various other zoning actions violate:  
14 RLUIPA, 42 U.S.C. § 2000cc (Counts 1-3); its freedom of religion, U.S. Const. amends. I, XIV  
15 (Counts 4-6); its rights to speak and assemble, U.S. Const. amend. I, XIV and Cal. Const. art. 1  
16 §§ 1-2 (Counts 7-9); and its rights to due process and equal protection of the laws, U.S. Const.  
17 amend. XIV and Cal. Const. art. 1 § 7 (Counts 10-13). Cottonwood also alleges that the City’s  
18 refusal to grant its CUP, its exercising eminent domain over the Cottonwood Property, and its  
19 various other zoning actions amount to a taking without just compensation and are a “private  
20 taking,” all in violation of the Fifth Amendment to the United States Constitution (Count 14) and  
21 are null and void for being religiously discriminating, Cal. Gov’t Code § 65008 (Count 15).  
22 Cottonwood seeks: a Writ of Mandate to review the City’s adoption of amendments to the LART  
23

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24 <sup>6</sup> At oral argument, Defendants cited to *Hicks v. Miranda*, 422 U.S. 332, 349, 95 S.  
25 Ct. 2281, 2292 (1975), wherein the Court held that abstention still applies when the state  
26 criminal proceeding were filed “after the federal complaint is filed but before any  
27 proceedings of substance on the merits have taken place in the federal court.” It is not  
28 clear that the same logic applies to state civil proceedings. Nonetheless, proceedings on  
the merits commenced in this case when Defendants filed the instant motion to dismiss on  
May 13, 2002, 16 days before filing the state eminent domain action.

1 Plan for various violations of the Community Redevelopment Law, Cal. Civ. Proc. Code § 1085  
2 (Counts 16-17) and violation of certain environmental laws, Cal. Pub. Res. Code § 21168.5 and  
3 Cal. Code Civ. Proc. § 860 (Counts 18-20); a Writ of Mandate to review the City's adoption of  
4 the moratorium, Cal Code Civ. Proc. § 860 (Count 21); and a Writ of Mandate to review the  
5 adoption of the resolution of conformity and the resolution of necessity which authorized the  
6 Redevelopment Agency to take the Cottonwood Property, Cal. Civ. Proc. Code §§ 860, 1085 and  
7 Cal. Pub. Res. Code § 21168.5 (Counts 22-27). Cottonwood is therefore challenging the City's  
8 refusal to grant its CUP application, its various zoning decisions that affected the Cottonwood  
9 Property, and the City's exercising eminent domain over the Cottonwood Property.

10 If Cottonwood can demonstrate that it has a likelihood of success on its claims relating to  
11 Defendants' attempt to exercise eminent domain over the Cottonwood Property, then an  
12 injunction is obviously appropriate (so long as the other two factors are met). Defendants,  
13 however, argue that only the condemnation proceedings are at issue here, and Cottonwood's  
14 claims regarding the denial of its CUP and Cypress's other land use decisions are irrelevant to  
15 the present motion. That is not so. If the City has wrongfully failed to grant Cottonwood a CUP  
16 for its church construction, then Defendants' attempt to condemn land that had zoning  
17 entitlements becomes a more difficult endeavor. Exercise of eminent domain where a church  
18 exists requires a stronger showing by the City for several reasons. A modern church facility  
19 would not be considered a blight on the community, the centrality of the Cottonwood Property to  
20 Cottonwood's freedom of religion rights would be vastly greater, and the value of the  
21 Cottonwood Property would increase. Thus, the City cannot take the land, based in large part on  
22 the absence of a church facility, if its own illegal actions prevented the church from being built.  
23 The same is true of Defendants' other zoning decisions. Thus, if Cottonwood has a likelihood of  
24 success on any of its claims (and the other factors for an injunction are met), an injunction is  
25 appropriate to prevent the condemnation of the land until the zoning issues are finally resolved.

## 26 **2. Strict Scrutiny Standard of Review**

27 Cottonwood argues that Defendants' various zoning decisions and efforts to condemn the  
28 Cottonwood Property are subject to a strict scrutiny and that the City's actions can only be

1 upheld if they are the least restrictive means taken to advance a compelling government interest.  
2 Defendants, however, argue that review of government actions under the Free Exercise Clause,  
3 U.S. Const. amend. I, are governed by a rational basis standard. *See Employment Div., Dep't of*  
4 *Human Res. of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990). Here, a strict scrutiny  
5 analysis applies for several different reasons.

6 *i. RLUIPA*

7 RLUIPA provides a strict scrutiny standard of review for land use cases. Specifically, it  
8 prohibits any government agency from imposing or implementing:

9 a land use regulation in a manner that imposes a substantial burden  
10 on the religious exercise of a person, including a religious assembly  
11 or institution, unless the government demonstrates that imposition of  
12 the burden on that person, assembly, or institution—(A) is in  
13 furtherance of a compelling governmental interest; and (B) is the  
14 least restrictive means of furthering that compelling governmental  
15 interest.

16 42 U.S.C. § 2000cc(a)(1).

17 RLUIPA is the most recent in a series of tugs and pulls between Congress and the  
18 Supreme Court to define the scope and extent of the Free Exercise Clause. In *Smith*, the  
19 Supreme Court rejected a long history of Free Exercise Clause jurisprudence that required strict  
20 scrutiny of any state action that substantially burdened religious freedom. 494 U.S. at 883, 110  
21 S. Ct. at 1602 (rejecting *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790 (1963); *Thomas v.*  
22 *Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 101 S. Ct. 1425 (1981); *Hobbie v.*  
23 *Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 107 S. Ct. 1046 (1987). Instead of  
24 the traditional strict scrutiny test, the Supreme Court determined that the adoption of a neutral,  
25 generally applicable law did not violate the Free Exercise Clause regardless of its potential  
26 effects on religious exercise. *Id.* at 879, 110 S. Ct. at 1600.

27 The decision in *Smith* set off significant controversy. In response, Congress passed and  
28 President Clinton signed the Religious Freedom and Restoration Act of 1993 (RFRA), Pub. L.

1 103-141, § 2 (codified at 42 U.S.C. § 2000bb). Acting pursuant to the Enforcement Clause of  
2 the Fourteenth Amendment to the Constitution, U.S. Const. amend. XIV § 5, RFRA was  
3 designed to “restore the compelling interest test as set forth in” *Sherbert*, 374 U.S. at 398 and  
4 *Wisconsin v. Yoder*, 406 U.S. 205 (1972). 42 U.S.C. § 2000bb(b)(1). Thus, as far as Congress  
5 was concerned, the *Smith* Court’s “neutral, generally applicable” jurisprudence was retired and  
6 claims under the Free Exercise clause were to be determined under the familiar strict scrutiny  
7 test.

8 The Supreme Court, however, had other ideas, and in *City of Boerne v. Flores*, 521 U.S.  
9 507, 536, 117 S. Ct. 2157, 2172 (1997), the Court held that RFRA was unconstitutional. The  
10 Court determined that RFRA exceeded Congress’s enforcement authority and was instead an  
11 attempt to expand the Constitution’s substantive rights. *Id.*

12 Congress once again acted. In July 2000, Senators Orrin Hatch, Republican of Utah and  
13 Edward Kennedy, Democrat of Massachusetts, introduced RLUIPA in the Senate. Gaining bi-  
14 partisan support, RLUIPA unanimously passed both houses of Congress and was signed by  
15 President Clinton on September 22, 2000.

16 The jurisdictional underpinning for RLUIPA is distinct from RFRA. First, RLUIPA only  
17 covers state action aimed at land use decisions and persons in jails or mental facilities. 42  
18 U.S.C. §§ 2000cc-2000cc-1. Second, application of RLUIPA is limited to cases that affect  
19 federally financed programs, interstate and foreign commerce, or cases where the land use  
20 decisions are part of a system of “individualized assessments.” 42 U.S.C. § 2000cc(a)(2). By  
21 limiting RLUIPA in this way, Congress has acted primarily pursuant to its power under the  
22 Spending and Commerce Clauses, U.S. Const. art. I, § 8, cls. 1, 3. Only application of RLUIPA  
23 to “land use regulation[s] or system[s] of land use regulations, under which a government makes,  
24 or has in place formal or informal procedures or practices that permit the government to make,  
25 individualized assessments” comes under the rubric of Congress’s authority under the  
26 Enforcement Clause of the Fourteenth Amendment. 42 U.S.C. § 2000cc(a)(2)(C). To the extent  
27 that RLUIPA is enacted under the Enforcement Clause, it merely codifies numerous precedents  
28 holding that systems of individualized assessments, as opposed to generally applicable laws, are

1 subject to strict scrutiny. *See Freedom Baptist Church of Delaware County v. Tp. of*  
2 *Middletown*, 204 F. Supp.2d 857, 868 (E.D. Pa. 2002) (“What Congress manifestly has done in  
3 this subsection is to codify the individualized assessments jurisprudence in Free Exercise cases  
4 that originated with the Supreme Courts decision in *Sherbert . . .*”); *see, e.g., Church of the*  
5 *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38, 113 S. Ct. 2217, 2229 (1993);  
6 *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999);  
7 *see also* Part III.C.2.ii, *infra*.<sup>7</sup>

8 RLUIPA’s strict scrutiny standard applies for two reasons here. First, Cottonwood’s  
9 construction project and eventual church affect commerce. Church activities have a significant  
10 impact on interstate commerce. Churches, such as Cottonwood, are “major participants in  
11 interstate markets for goods and services, use of interstate communications and transportation,  
12 raising and distributing revenues (including voluntary revenues) interstate, and so on.” *United*  
13 *States v. Grassie*, 237 F.3d 1199, 1209 (10th Cir. 2001) (citing *Camps Newfound/Owatonna, Inc.*  
14 *v. Town of Harrison*, 520 U.S. 564, 584, 117 S. Ct. 1590 (1997)) (rejecting a defendant’s  
15 challenge to conviction under federal arson law on the basis that churches did not affect  
16 interstate commerce). As the Tenth Circuit noted in *Grassie*, there is voluminous evidence  
17 showing the effect that church’s have on interstate commerce. *Id.* at 1210 n.7 (citing *Religious*  
18 *Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution*  
19 *of the House Comm. on the Judiciary*, 105th Cong. 57-62 (1998) (prepared statement of Marc D.  
20 Stern, Director, Legal Department, American Jewish Congress)). The construction of the church  
21 will affect a large quantity of construction workers, construction materials, transportation  
22 vehicles and commercial financial transactions, all of which affect commerce. Additionally, the

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24 <sup>7</sup> Defendants have not attacked the Constitutionality of RLUIPA, at least at this  
25 stage of the proceedings. Because RLUIPA is based on the Spending and Commerce  
26 Clauses, and the codification of current precedent on individualized assessments, as  
27 detailed in this order, RLUIPA would appear to have avoided the flaws of its predecessor  
28 RFRA, and be within Congress’s constitutional authority. *See Freedom Baptist Church*,  
204 F. Supp. 2d at 863 (holding that RLUIPA is constitutional, in first case to address the  
issue.)

1 use of the church once it is constructed will affect commerce. Cottonwood will employ  
2 ministers, maintenance personnel, and daycare center workers. Cottonwood will use its church  
3 to transmit a televised ministry and hold national religious conferences. Furthermore, the  
4 bookstore will have employees and will regularly obtain merchandise for resale. All of these  
5 activities affect commerce.<sup>8</sup>

6 RLUIPA also requires the application of a strict scrutiny standard because the City’s  
7 refusal to grant Cottonwood its application for a CUP involves a “land use regulation or system  
8 of land use regulations, under which a government makes, or has in place formal or informal  
9 procedures or practices that permit the government to make, individualized assessments.” 42  
10 U.S.C. § 2000cc(a)(2)(C).<sup>9</sup>

11 *ii. Individualized Assessments Under the Free Exercise Clause*

12 Even in the absence of RLUIPA, a strict scrutiny standard of review is appropriate in this  
13 case under the Free Exercise Clause, U.S. Const. amend. I. Although *Smith* determined that  
14 there was no violation of the Establishment Clause when a government seeks to enforce a law of  
15 general applicability, it left undisturbed the application of a strict scrutiny test to situations where  
16 there are “individualized governmental assessment[s].” 494 U.S. at 884, 110 S. Ct. at 1603.  
17 Cases before and after *Smith* have continued to apply a strict scrutiny test to such individualized  
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19 <sup>8</sup> At the least, Cottonwood has demonstrated a fair probability of success in  
20 showing that its church construction and usage will affect interstate commerce.

21 <sup>9</sup> Defendants argue that RLUIPA does not apply because the exercise of eminent  
22 domain is not a “land use regulation” under RLUIPA. Defendants, however, do not  
23 address the Commerce Clause jurisdiction of the statute. Moreover, Defendants insist  
24 that only the condemnation proceedings are at issue in this motion, a position with which  
25 the Court has already disagreed. Even if the Court were only considering the  
26 condemnation proceedings, they would fall under RLUIPA’s definition of “land use  
27 regulation” which is defined as “a zoning or landmarking law, or the application of such a  
28 law, that limits or restricts the claimant’s use or development of land . . . .” 42 U.S.C. §  
2000cc-5(5). The Redevelopment Agency’s authority to exercise eminent domain to  
contravene blight, as set forth in the Resolution of Necessity, is based on a zoning system  
developed by the City (the LART Plan). It would unquestionably “limit[] or restrict[]”  
Cottonwood’s “use or development of land.”

1 assessment questions. *E.g., Christian Gospel Church, Inc. v. City and County of San Francisco*,  
2 896 F.2d 1221, 1224 (9th Cir. 1990) (pre-*Smith* case applying strict scrutiny to land-use  
3 decisions); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 180 (Wash. 1992)  
4 (post-*Smith* case applying strict scrutiny to historical landmark decision); *Peterson v. Minidoka*  
5 *County School Dist. No. 331*, 118 F.3d 1351 (9th Cir. 1997) (post-*Smith* case applying strict  
6 scrutiny for individualized assessments in government personnel decisions).

7           No one contests that zoning ordinances must by their nature  
8           impose individual assessment regimes. That is to say, land use  
9           regulations through zoning codes necessarily involve case-by-case  
10          evaluations of the propriety of proposed activity against extant land  
11          use regulations. They are, therefore, of necessity different from laws  
12          of general applicability which do not admit to exceptions on Free  
13          Exercise grounds.

14 *Freedom Baptist Church*, 204 F. Supp. 2d at 868.<sup>10</sup> Defendants’ land-use decisions here are not  
15 generally applicable laws. Just like the historical landmarking decisions at issue in *First*  
16 *Covenant Church of Seattle*, the City’s refusal to grant Cottonwood’s application for a CUP  
17 “invite[s] individualized assessments of the subject property and the owner’s use of such  
18 property, and contain mechanisms for individualized exceptions.” 840 P.2d at 181. Even the  
19 Redevelopment Agency’s Resolution of Necessity and Defendants’ efforts to condemn the land  
20 are individualized assessments. By condemning the Cottonwood Property, the Redevelopment  
21 Agency had to come to the decision that the Cottonwood Property was blighted, that the  
22

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24           <sup>10</sup> Despite the logic of *Freedom Baptist Church*, the City argues that the Supreme  
25 Court held that zoning laws were neutral, generally applicable laws in *City of Boerne*, 521  
26 U.S. 507, 117 S. Ct. 2157. *City of Boerne*, however, did not address that issue. That case  
27 came before the Court on interlocutory appeal. The sole issue was whether RFRA  
28 exceeded Congress’s authority under the Enforcement Power of the Fourteenth  
Amendment. *Flores v. City of Boerne*, 877 F. Supp. 355, 356 (W.D. Tex. 1995). No  
decision was made by the Supreme Court on any other issue, including the nature of local  
zoning laws. The ultimate result of the case is not found in the reports.

1 Walker/Katella Retail Project was consistent with the Specific Plan and the LART plan, and that  
2 condemning the land was the only solution.

3 Defendants argue that the “individualized assessments” exception to *Smith* is only for  
4 cases where the government creates exceptions to the statutory scheme for secular purposes, but  
5 not for religious purposes. According to Defendants, the exception encompasses only situations  
6 “where the statutory scheme at issue allows the government to make value judgments concerning  
7 religious beliefs and not simply when the government makes legislative decisions with respect to  
8 applying generally-applicable zoning redevelopment, and eminent domain laws.” Defendants’  
9 argument mis-characterizes the nature of their actions and improperly cabins the protections of  
10 the Free Exercise Clause in a way that begs for local officials to discriminate against religious  
11 institutions.

12 First, although the original adoption of a zoning map may be legislative, Defendants’  
13 actions on Cottonwood’s CUP application and its exercise of eminent domain are not purely  
14 legislative actions. They are quasi-judicial decisions wherein a municipal agency is required to  
15 hold public hearings, take testimony from the affected landowners, and make specific factual  
16 findings. Cal. Civ. Proc. Code § 1245.235. The local agency is required to apply the general  
17 zoning law to the specific property in question and its decisions are subject to judicial review.  
18 Cal. Civ. Proc. Code § 860.

19 Second, *Smith* makes no such narrow exception. There is no question that the Court  
20 specifically noted “where the State has in place a system of individual exemptions, it may not  
21 refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” *Smith*,  
22 494 U.S. at 884, 110 S. Ct. at 1603. But the holding in *Smith* is simply that otherwise valid,  
23 neutral, and generally applicable laws do not violate the Free Exercise Clause. *See City of*  
24 *Boerne*, 521 U.S. at 514, 117 S. Ct. at 2161. If there is not a neutral, generally applicable law,  
25 then *Smith* does not apply. The mere fact that the Court recited one circumstance where *Smith*  
26 does not apply does not lead to the conclusion that it must apply in all other circumstances. All  
27  
28

1 elements set forth in *Smith* must be met.<sup>11</sup>

2 The cases cited by Defendants do not undermine this position. *Fraternal Order of Police*,  
3 170 F.3d at 364, merely restates the *Smith* Court’s admonition that where a government agency  
4 allows secular exceptions, the denial of religious exceptions must meet strict scrutiny and  
5 *Rector, Wardens, and Members of Vestry of St. Bartholomew’s Church v. City of New York*, 914  
6 F.2d 348 (2d Cir. 1990) is distinguishable. In *St. Bartholomew’s*, a New York City Episcopal  
7 Church wanted to replace its single story midtown “community house” with a 47 story  
8 commercial skyscraper. The New York City Landmark Preservation Commission, which had  
9 designated the community house an historical landmark, refused to grant it permission. In *St.*  
10 *Bartholomew’s*, the court determined that there was no substantial burden on the church’s  
11 religious activity, and thus the strict scrutiny standard was never in question. *Id.* at 357. There  
12 was no dispute in *St. Bartholomew’s* that the proposed new use was for commercial, not  
13 religious reasons. *Id.* The Second Circuit found that the district court was correct in the central  
14 issue of that case—that the church had “failed to show by a preponderance of the evidence that it  
15 can no longer conduct its charitable activities or carry out its religious mission in its existing  
16 facilities.” *Id.* (quoting *St. Bartholomew’s Church v. City of New York*, 728 F. Supp. 958,  
17 974-75 (S.D.N.Y. 1989)).

18 Here, Cottonwood is seeking to build a church, not a skyscraper. Its proposed use is  
19 unquestionably religious, not commercial. Thus, as discussed *infra*, there is substantial burden  
20 on Cottonwood’s religious exercise, and therefore the strict scrutiny standard is invoked. *See*  
21 *also First Covenant Church of Seattle*, 840 P.2d at 181 (distinguishing *St. Bartholomew’s* on  
22 similar grounds).

23 Finally, application of the law as Defendants propose it invites deception and  
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25 <sup>11</sup> It is perhaps a misnomer to refer to the “individualized assessments” test as an  
26 “exception” to *Smith*. In practice, there are two types of Free Exercise Clause  
27 jurisprudence—those cases where there is a neutral, generally applicable law, and those  
28 cases where there is not. In the first kind, *Smith* applies and in the second kind, strict  
scrutiny applies. Viewed this way, *Smith* is more like the exception.

1 discrimination. Instead of defining specific secular exceptions, and thus requiring adoption of  
2 religious exceptions, government agencies could vest absolute discretion in a single person or  
3 body. That decision-maker would then free to discriminate against religious uses and exceptions  
4 with impunity, without any judicial review. Indeed, the CUP application process at issue here is  
5 a less extreme version of that system. The City could consistently grant secular uses that are  
6 practically no different from rejected uses. Judicial Review must be in place to protect against  
7 this type of abuse any time a government agency is making individual assessments that might  
8 infringe on a fundamental right.

9 *iii. Discriminatory Ordinances Under the Free Exercise Clause*

10 Strict scrutiny is also appropriate because there is strong evidence that Defendants'  
11 actions are not neutral, but instead specifically aimed at discriminating against Cottonwood's  
12 religious uses. "At a minimum, the protections of the Free Exercise Clause pertain if the law at  
13 issue discriminates against some or all religious beliefs or regulates or prohibits conduct because  
14 it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye*, 508 U.S. at 533, 113  
15 S. Ct. at 2226. In *Church of the Lukumi Babalu Aye*, the Supreme Court invalidated a local  
16 ordinance that prohibited the killing of animals because it discriminated against a Santeria  
17 church that practiced ritual animal sacrifice. *Id.* Although the ordinance was neutral on its face,  
18 the Court specifically rejected the defendant city's argument that facial neutrality was  
19 determinative in applying *Smith*. *Id.* at 534, 113 S. Ct. at 2227.

20 The Free Exercise Clause, like the Establishment Clause, extends  
21 beyond facial discrimination. The Clause forbids subtle departures  
22 from neutrality, and covert suppression of particular religious beliefs.  
23 Official action that targets religious conduct for distinctive treatment  
24 cannot be shielded by mere compliance with the requirement of  
25 facial neutrality. The Free Exercise Clause protects against  
26 governmental hostility which is masked, as well as overt. The Court  
27 must survey meticulously the circumstances of governmental  
28 categories to eliminate, as it were, religious gerrymanders.

1 *Id. Accord St. Bartholomew's*, 914 F.2d at 355 (“We agree with the district court that no First  
2 Amendment violation has occurred absent a showing of discriminatory motive.”). The  
3 government’s motive may be determined both from direct and circumstantial evidence. *Id.* at  
4 540, 113 S. Ct. at 2230-31. “Relevant evidence includes, among other things, the historical  
5 background of the decision under challenge, the series of events leading to the enactment or  
6 official policy in question, and the legislative or administrative history, including  
7 contemporaneous statements made by members of the decisionmaking body.” *Id.*

8 Here, there is significant circumstantial evidence of a discriminatory intent. For nearly a  
9 decade, the Cottonwood Property sat vacant. Despite having been declared a blight, having been  
10 the subject of both the Specific Plan and the LART Plan, and being under the authority of the  
11 Redevelopment Agency, no improvements were made. Indeed, less than 10% of the LART Plan  
12 Area has been developed. Once Cottonwood purchased the land, however, the City became a  
13 bundle of activity and developed the Town Center and the Walker/Katella Retail Project for the  
14 LART Plan Area.

15 At first blush, the City’s concern about blighting rings hollow. Why had the City, so  
16 complacent before Cottonwood purchased the Cottonwood Property, suddenly burst into action?  
17 Although some innocent explanations are feasible—such as new leadership or robust economic  
18 growth—the activity suggests that the City was simply trying to keep Cottonwood out of the City,  
19 or at least from the use of its own land. This suspicion is heightened by the nature of the  
20 projects. The LART Plan called for the Cottonwood Property to be used as business offices.  
21 Yet, while the City has been insistent that a church would be inconsistent with this plan, it has  
22 proceeded to plan a shopping/entertainment center (the Town Center project) and a strip mall  
23 anchored by Costco (the Walker/Katella Retail Project), neither of which are consistent with a  
24 business park. Conveniently, the Walker/Katella Retail Project consists only of the Cottonwood  
25 Property.

26 Similarly, the City’s claim that it needs the tax revenue of a retail store is dubious. In her  
27 State of the City Address, Mayor Lydia Sondhi trumpeted Cypress’s good fiscal condition,  
28 stating that the City “continue[s] to set aside 25% in reserves annually while still delivering the

1 highest quality of service to our community. We continue to do so WITHOUT  
2 IMPLEMENTATION OF A UTILITY TAX, which is an issue that has plagued our immediate  
3 surrounding cities.” Lydia Sondhi, *2002 State of the City Address*, at  
4 [http://www.ci.cypress.ca.us/city\\_council/state\\_of\\_city\\_2002.htm](http://www.ci.cypress.ca.us/city_council/state_of_city_2002.htm) (emphasis in original).

5 These factors, and the City’s motives are best decided at trial. At this stage, however, the  
6 evidence indicates at least a fair probability of success on the merits, and thus warrants an  
7 injunction.

### 8 **3. Substantial Burden**

9 Before strict scrutiny can be applied, Cottonwood must prove that Cypress’s zoning and  
10 eminent domain actions substantially burden its exercise of religion. 42 U.S.C. § 2000cc-2(b).  
11 Cottonwood has met that burden here.

12 Cottonwood is unable to practice its religious beliefs in its current location. Simply put,  
13 its Los Alamitos facility cannot handle the congregation’s large and growing membership, and  
14 its small quarters prevent Cottonwood from meeting as a single body, as its beliefs counsel.

15 The district court in *Murphy v. Zoning Com’n of Town of New Milford*, 148 F. Supp.2d  
16 173 (D. Conn. 2001), thoroughly set out the framework on the issue of “substantial burden”:

17 “Substantial burden” has been defined or explained in various ways  
18 by the courts. *See Thomas*, 450 U.S. at 718, 101 S. Ct. at 1432  
19 (exists where state “put[s] substantial pressure on an adherent to  
20 modify his behavior and to violate his beliefs”); *Sherbert*, 374 U.S.  
21 at 404, 83 S. Ct. at 1794 (occurs when a person is required to  
22 “choose between following the precepts of her religion and forfeiting  
23 benefits, on the one hand, and abandoning the precepts of her  
24 religion . . . on the other”); *Bryant v. Gomez*, 46 F.3d 948, 949 (9th  
25 Cir. 1995) (state action “prevent[s] him or her from engaging in  
26 conduct or having a religious experience that is central to the  
27 religious doctrine”); *Reese v. Coughlin*, No. 93 CIV. 4748 (LAP),  
28 1996 WL 374166, \*6 (S.D.N.Y. July 3, 1996) (quoting *Davidson v.*

1           *Davis*, No. 92 CIV. 4040 (SWK), 1995 WL 60732, \*5 (S.D.N.Y.  
2           Feb.14, 1995)) (same). This burden must be more than an  
3           inconvenience to the plaintiffs, but the court's "scrutiny extends only  
4           to whether a claimant sincerely holds a particular belief and whether  
5           the belief is religious in nature." *Jolly v. Coughlin*, 76 F.3d 468, 476  
6           (2d Cir.1996).

7           *Id.* Defendants argue that the "substantial burden" test should be narrowly construed so as to  
8           only affect those activities by the government that coerce an individual into an activity  
9           prohibited by his religion. By that rubric, Defendants contend that preventing Cottonwood from  
10          building a church would not substantially burden its religious exercise.

11          That definition of "substantial burden" is insufficient. Preventing a church from building  
12          a worship site fundamentally inhibits its ability to practice its religion. Churches are central to  
13          the religious exercise of most religions. If Cottonwood could not build a church, it could not  
14          exist.

15          Defendants' position at oral argument bears out this principle. Defendants conceded that  
16          the proscription of peyote use in *Smith* substantially burdened the Native Americans' religious  
17          exercise because not smoking peyote meant that the religious ritual could not be performed. *See*  
18          *Smith*, 494 U.S. at 903, 110 S. Ct. 1613 (O'Connor, J. concurring) ("There is no dispute that  
19          Oregon's criminal prohibition of peyote places a severe burden on the ability of respondents to  
20          freely exercise their religion.") By the same token preventing a church from building a house of  
21          worship means that numerous religious services cannot be performed. RLUIPA appears to  
22          recognize this concern by specifically defining "[t]he use building or conversion of real property  
23          for the purpose of religious exercise" as the type of religious exercise that cannot be substantially  
24          burdened absent a compelling interest. 42 U.S.C. § 2000cc-5(7)(B).

25          The Court instead relies on the broader interpretation given by the Ninth Circuit in  
26          *Bryant*, 46 F.3d at 949, where the court stated that a substantial burden on a person's religious  
27          freedom is placed on him or her when the government's action "prevent[s] him or her from  
28          engaging in conduct or having a religious experience which the faith mandates." In *Bryant*, the

1 Ninth Circuit rejected a prisoner’s claim under RFRA that the prisons’ refusal to hold  
2 Pentecostal services violated his rights. *Id.* There, however, the prisoner “ha[d] not argued or  
3 provided evidence to show that [certain practices] are mandated by his faith.” *Id.*

4 In contrast, Cottonwood here has demonstrated that meeting in one location at one time,  
5 as well as providing numerous ministries, are central to its faith.<sup>12</sup> Thus, beyond the  
6 fundamental need to have a church, Cottonwood has shown a religious need to have a large and  
7 multi-faceted church.

8 Defendants’ attempts to deflate this principle are unpersuasive. Defendants cite *Lyng v.*  
9 *Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 448, 108 S. Ct. 1319, 1324-25  
10 (1988), where the Court denied a claim brought by Native Americans that the federal  
11 government’s construction of a road on a traditional worship site would impede their religious  
12 practices. There, however, the property was owned by the government. Although the Court  
13 recognized that the burden imposed on the Native Americans was significant, it ruled that the  
14 government was free to conduct its own internal affairs in the way it considers most proper. *Id.*  
15 (citing *Bowen v. Roy*, 476 U.S. 693, 106 S. Ct. 2147 (1986)). The City’s actions here do not  
16 relate to its internal affairs, but instead relate to its attempt to regulate the conduct of its  
17 residents.

18 Defendants also point to *Thiry v. Carlson*, 887 F. Supp. 1407, 1413 (D. Kan. 1995),  
19 where the court held that the condemnation of a personal burial site of the landowners’ stillborn  
20 child, where they frequently prayed, did not substantially burden their religious exercise. *Thiry*,  
21 however, is distinguishable on several grounds. The site in *Thiry* was not the only, or even  
22 primary, place of worship. *Id.* There was also no evidence that their religious beliefs prevented  
23 them from moving the gravesite. *Id.* Here, the Cottonwood Property will be the main church  
24 worship site. Cottonwood has demonstrated, as a practical matter, it cannot move since it needs  
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26 <sup>12</sup> It is worth repeating at this point that “[i]t is not within the judicial ken to  
27 question the centrality of particular beliefs or practices to a faith, or the validity of  
28 particular litigants’ interpretations of those creeds.” *Hernandez v. Commissioner*, 490  
U.S. 680, 699, 109 S. Ct. 2136, 2148 (1989).

1 a large property in the Cypress or Los Alamitos area, and obtaining the Cottonwood Property  
2 was a five-year endeavor.

3 Finally, it is worth noting that the prohibition is against “substantially” burdening  
4 religious exercise. The question is therefore one of degree. The burden on two people is not so  
5 great as the burden on more than 4,000 Cottonwood members and their families.

#### 6 **4. Compelling State Interest**

7 Defendants advance two interests for refusing to grant Cottonwood’s CUP and  
8 condemning the Cottonwood Property—blight and generating revenue for the City. Neither  
9 interest is sufficiently compelling to justify burdening Cottonwood’s religious exercise.

##### 10 *i. “Blight”*

11 “Blight” can constitute “an ‘esthetic harm.’” *Members of the City Council of the City of*  
12 *Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 807, 104 S. Ct. 2118, 2131 (1984) (quoting  
13 *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510, 101 S. Ct. 2882, 2893-94 (1980)). The  
14 Supreme Court has held that esthetic concerns are substantial governmental interests.  
15 *Metromedia*, 453 U.S. at 507-510, 101 S. Ct. at 2892-94. It is, however, only a compelling  
16 interest that can justify burdening Cottonwood’s religious exercise rights. Moreover, it is  
17 evident that the refusal to grant Cottonwood’s application for a CUP was not at all premised on  
18 blight. The construction of a church on the Cottonwood Property would eliminate the blight.

19 A second problem with Defendants’ asserted justification is that the evidence does not  
20 necessarily support a finding of blight. Although the City asserts that its 1990 determination of  
21 blight is conclusive, examination of local laws under the strict scrutiny analysis requires not only  
22 that the government’s stated purpose is a compelling interest, but that it is also a genuinely-held  
23 purpose. *See Lincoln Club of Orange County v. City of Irvine*, 274 F.3d 1262, 1269 (9th Cir.  
24 2001), *opinion amended and superseded*, 292 F.3d 934 (9th Cir. 2002) (holding that defendant  
25 city’s purpose in adopting campaign finance law was a genuine issue of material fact, despite  
26 that purpose being stated in legislation). A 12 year-old determination of blight hardly seems  
27 compelling—indeed, it did not compel the City to take action until after Cottonwood purchased  
28 the Cottonwood Property.

1                    **ii.      Revenue Generation**

2                    Defendants’ second asserted purpose in denying Cottonwood’s CUP application and  
3 exercising eminent domain over the Cottonwood Property is that it needs to generate revenue  
4 and a tax base for the City and the LART Plan Area. Revenue generation is not the type of  
5 activity that is needed to “protect public health or safety.” *First Covenant Church of Seattle*, 840  
6 P.2d at 185. Cottonwood is, as are most churches, a tax-exempt non-profit group. If revenue  
7 generation were a compelling state interest, municipalities could exclude all religious institutions  
8 from their cities. “So universal is the belief that religious and educational institutions should be  
9 exempt from taxation that it would be odd indeed if we were to disapprove an action of the  
10 zoning authorities consistent with such belief and label it adverse to the general welfare.”  
11 *Jacobi v. Zoning Bd. of Adjustment of Lower Moreland Tp.*, 196 A.2d 742, 745 (Pa. 1964).

12                    The revenue generation concerns of the City are even more suspect than the concerns of  
13 blight. Not only has the City not acted for 12 years to place a revenue generating use on the  
14 land, but apparently, this has not caused any harm to the City, which has maintained a 25%  
15 budget surplus without imposing a utility tax. *See Lydia Sondhi, 2002 State of the City Address.*  
16 There is no evidence that the construction and operation of the Cottonwood church will place a  
17 significant burden on city resources or require expansion of roads maintained by the City.<sup>13</sup>  
18 Indeed, the Cottonwood bookstore is likely to generate sales tax revenue, and the operation of  
19 the church will draw large numbers of people to the surrounding properties, which although  
20 currently undeveloped, could be turned into revenue generating uses.

21                    **5.      Least Restrictive Means**

22                    Even if Defendants had compelling reasons to burden Cottonwood’s religious exercise,  
23 they must do so in the least restrictive means. Far from doing that, the City has done the  
24 equivalent of using a sledgehammer to kill an ant. Assuming that removing the blight from the  
25 Cottonwood Property was a compelling state interest, the City could eliminate the blight simply

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27                    <sup>13</sup> In contrast, placing a Costco on the Cottonwood Property would substantially  
28 increase the traffic use on the present streets during the high-traffic daytime and evening  
hours, seven days a week.

1 by allowing Cottonwood to build its church. The area would be developed, would provide  
2 substantial community services, and Cottonwood’s religious exercise would not be infringed.  
3 Similarly, the City has not demonstrated that there is no other way to provide for revenue  
4 without taking the property and preventing Cottonwood from building its church. Municipalities  
5 have numerous ways of generating revenue without preventing tax-free religious land uses.

6 **6. Failure of Public Use Requirement for Taking**

7 Cottonwood has also demonstrated a likelihood of success on its takings claim, arguing  
8 that Defendants’ condemnation of the Cottonwood Property to turn over to Costco is not a  
9 “public use.” Judge Wilson of this Court has explained the public use requirement with great  
10 skill:

11 The Fifth Amendment to the Constitution proscribes the  
12 “taking” of private property “for public use without just  
13 compensation.” U.S. Const., amend. V. The “public use”  
14 requirement is an explicit limit on the power of government to take  
15 private property for, as the Supreme Court has long recognized, a  
16 taking—even if justly compensated—must serve a legitimate public  
17 purpose. *See Thompson v. Consol. Gas Corp.*, 300 U.S. 55, 80, 57 S.  
18 Ct. 364, 377 (1937). A taking for purely private use is  
19 unconstitutional no matter the amount of “just compensation” that  
20 may be given. *See id; Armendariz v. Penman*, 75 F.3d 1311, 1320  
21 (9th Cir.1996) (en banc). “A purely private taking could not  
22 withstand the scrutiny of the public use requirement; it would serve  
23 no legitimate purpose of government and would thus be void.”  
24 *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245, 104 S. Ct.  
25 2321, 2331 (1984).

26 *99 Cents Only Stores v. Lancaster Redev. Agency*, No CV 00-07572 SVW, 2001 WL 811056  
27 (C.D. Cal. June 26, 2001). Courts must look beyond the government’s purported public use to  
28 determine whether that is the genuine reason or if it is merely pretext.

1            *99 Cents Only Stores* presents a factual situation strikingly similar to the present case.  
2 There, “Lancaster’s condemnation efforts rest[ed] on nothing more than the desire to achieve the  
3 naked transfer of property from one private party to another.” *Id.* at \*5. That appears to be the  
4 case here. Defendants’ planning efforts here appear to consist of finding a potential landowner  
5 for property that they did not own, and then designing a development plan around that new user.  
6 In *99 Cents Only Stores*, it was “undisputed that Costco could have easily expanded . . . onto  
7 adjacent property without displacing 99 Cents at all but refused to do so.” *Id.* Although that  
8 conclusion is not clear from the record in this case, there is strong evidence that Costco could  
9 locate on property adjacent to the Cottonwood Property, perhaps even on the remaining 18 to 28  
10 acres that were initially part of the Town Center project. If Defendants’ taking decision was  
11 made in order to “appease Costco,” the exercise of eminent domain is not for a “public use.” *Id.*

12            Defendants, however, argue that the City’s 1990 determination of blight is beyond  
13 judicial review under California’s redevelopment laws. Judge Wilson addressed the same  
14 argument in *99 Cents Only Stores*:

15                    Regardless of whether new blight findings are required by California  
16 law—an issue the Court expressly declines to address—the existence of  
17 such findings are relevant under federal law only insofar as they bear  
18 upon the Court’s ‘public use’ analysis under the Fifth Amendment.  
19 Independent of California law, Lancaster must present a valid public  
20 use within the meaning of the Takings Clause supporting its decision  
21 to condemn 99 Cents’ property interest.

22 *Id.* n.2.<sup>14</sup>

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25            <sup>14</sup> There is admittedly a distinction in the present case from *99 Cents Only Stores*.  
26 While the subject property in *99 Cents Only Stores* was developed at the time that  
27 Lancaster initiated condemnation proceedings, the Cottonwood Property remains  
28 undeveloped. The Cottonwood Property, however, is only undeveloped because  
Defendants have blocked Cottonwood’s proposed construction plans.

1 Cottonwood has therefore shown at least a fair question on the merits of its takings claim  
2 on public use grounds.

3 **D. Irreparable Injury**

4 Little serious question exists that if Defendants were allowed to condemn the Cottonwood  
5 Property, Cottonwood would suffer irreparable injury. Every piece of property is unique and  
6 thus damages are an insufficient remedy to the denial of property rights. *Glynn v. Marquette*,  
7 199 Cal. Rptr. 306, 308 (Cal. Ct. App. 1984) (citing Cal Civ. Code § 3387) (“Specific  
8 performance is given in land sale contracts because it is assumed every piece of property is  
9 unique and that the buyer’s remedy by way of damages is inadequate.”)

10 Defendants assert that Cottonwood can make the same arguments it makes here in the  
11 state condemnation proceedings. Cottonwood could not, however, assert its claims regarding the  
12 City’s refusal to grant its CUP application and the other zoning decisions affecting the  
13 Cottonwood Property. Without being able to address those issues first, thereby determining  
14 whether the City should have allowed Cottonwood to build its church, Cottonwood would not be  
15 able to show that blight no longer exists.

16 **E. The Public Interest and Balance of Hardships**

17 Here, the public interest is decidedly in favor of granting the injunction. Both houses of  
18 Congress unanimously passed RLUIPA in the summer of 2002, and President Clinton promptly  
19 signed it into law. By passing RLUIPA, Congress conclusively determined the national public  
20 policy that religious land uses are to be guarded from interference by local governments to the  
21 maximum extent permitted by the Constitution.

22 Although RLUIPA alone establishes that the public interest is strongly in favor of  
23 granting the injunction here, other evidence indicates that the public interest favors granting the  
24 injunction. Twice, voters in Cypress rejected proposals for expansive commercial development  
25 in the LART Plan Area where the Cottonwood Property is located. Instead, by passing Measure  
26 D, Cypress voters reserved to themselves a tremendous degree of control over local zoning  
27 concerns and indicated an interest in limited growth.

28 The public interest also favors moving very cautiously in condemning private property for

1 uses that are only questionably public. Eminent domain is commonly used to acquire land to  
2 build highways and railways. Public utility facilities such as power plants, water treatment  
3 facilities also have the traditional public use character, as does the construction of government  
4 buildings. Eminent domain can even be an effective tool against free-riders who hold-out for  
5 exorbitant prices when private developers are attempting to assemble parcels for public places  
6 such as an arena or sports stadium. The framers of the Constitution, however, might be  
7 surprised to learn that the power of eminent domain was being used to turn the property over to a  
8 private discount retail corporation. Quite the opposite from a free-rider situation, there is no  
9 owner holding out for an exorbitant price. Instead, Cottonwood spent a year assembling the  
10 property without any government help.

11 Any claim by the City that it will suffer hardship by the issuance of the injunction is  
12 incredible on its face. For a decade before Cottonwood bought the Cottonwood Property, it was  
13 the subject of a redevelopment project and a specific land use plan, and under the authority of  
14 the Redevelopment Agency. Despite this, less than 10% of the land in the LART Plan Area was  
15 developed. Although the City contends that Cottonwood is disturbing its long-planned  
16 development efforts, it was only after Cottonwood purchased that land that the City moved  
17 aggressively to find other uses for the property.<sup>15</sup> Eventually, the City shaved down the scale of  
18 its proposed development to include only the Cottonwood Property.<sup>16</sup>

19 Cottonwood, on the other hand, would suffer immense hardship if the City were allowed  
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21 <sup>15</sup> There is, of course, no guarantee that the Walker/Katella Retail Project that  
22 Defendants plan for the Cottonwood Property would come to fruition once the property  
23 has been condemned. The Cottonwood Property has been the subject of numerous land  
24 use ideas over the years, but Cottonwood is the only property owner that has developed a  
25 use permitted under the Cypress's zoning laws.

26 <sup>16</sup> The City asserts that the LART Plan Area is one of the most underdeveloped  
27 areas of real property in Orange County. But the Walker/Katella Retail Project it has  
28 proposed for the Cottonwood Property would still leave well over half of the non-PS  
zoned property undeveloped. Although the City claims that the Walker/Katella Retail  
Project is the cornerstone of its redevelopment plan, the City's plans for the rest of the  
retail area remain a mystery to the Court.

1 to condemn the land and turn it over to a private retailer. Construction of a Costco could be  
2 completed within four months—despite this Court’s best efforts, a final resolution of these issues  
3 is unlikely in that time frame, as trial is not set until March 2003.

4       Once it is stripped of the ownership of its land, Cottonwood will have to start from square  
5 one. Although the City blithely asserts that Cottonwood can buy some other property “providing  
6 that [Cottonwood] is willing to pay the owner’s price,” it took Cottonwood four years to identify  
7 the appropriate location to build a church, and another year of negotiations to acquire the  
8 separate parcels. Assuming it can afford the owner’s price, Cottonwood will have to continue to  
9 wedge its growing congregation into ill-suited facilities for another five years.<sup>17</sup>

10       The public interest and the balance of hardships is overwhelmingly in favor of granting  
11 the injunction.

12 **F.    Alternative Test**

13       Cottonwood is entitled to a preliminary injunction under the traditional test. Even if the  
14 traditional test were not sufficient to grant the requested relief, Cottonwood would be entitled to  
15 an injunction under the so-called “alternative test.”

16       In cases such as this, where the balance of the hardships is so overwhelmingly in favor of  
17 the movant, a preliminary injunction may be issued upon a less rigorous showing of likelihood of  
18 success on the merits so long as the plaintiff’s allegations raise “serious questions” as to the  
19 merits. *Caribbean Marine Servs. Co.*, 844 F.2d at 674; *Am. Motorcyclist Ass’n*, 714 F.2d at 965;  
20 *Stanley*, 13 F.3d at 1319. Even if Cottonwood were not likely to succeed on the merits,  
21 Cottonwood has demonstrated at least “a fair chance of success.” *Martin*, 740 F.2d at 675;  
22 *Cairns*, 24 F. Supp. 2d at 1037. Combined with the enormous hardship it would suffer were the  
23 City to condemn its land, and compared to the non-existent hardship borne by Defendants, an  
24 injunction is also appropriate under the “alternative test.”

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27       <sup>17</sup> That time may prove even longer if Cottonwood once again finds its project  
28 opposed by a reluctant municipal government.

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2  
3 **IV.**

4 **CONCLUSION**

5 For the reasons set forth above, Defendants' motion to dismiss is DENIED. Plaintiff's  
6 motion for a preliminary injunction is GRANTED.

7 IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that during the  
8 pendency of this case, or until further order of this Court, Defendants the City of Cypress and the  
9 Cypress Redevelopment Agency (Defendants) may not take any additional steps: (1) in  
10 furtherance of an eminent domain action against Cottonwood Christian Center (Cottonwood), or  
11 (2) towards taking possession of Cottonwood's property (the Cottonwood Property) through the  
12 power of eminent domain, including without limitation, applying for an order of immediate  
13 possession of the Cottonwood Property.

14 IT IS SO ORDERED.

15 DATED: AUGUST 6, 2002

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19 DAVID O. CARTER  
20 United States District Judge  
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